

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	23-CV-369(NRM)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	
RARE BREED TRIGGERS, LLC, ET	:	Tuesday, January 24, 2023
AL.,	:	2:30 p.m.
	:	
Defendants.	:	
	:	

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TRANSCRIPT OF CIVIL CAUSE FOR EX PARTE HEARING
BEFORE THE HONORABLE NINA R. MORRISON
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

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1 THE COURTROOM DEPUTY: Civil cause for an ex parte
2 hearing for Case No. 23-CV-369, USA v. Rare Breed Triggers,
3 LLC, et al.

4 Will the Government state their appearance for the
5 record.

6 MR. BLUME: Good afternoon, your Honor. My name is
7 Michael Blume for the United States.

8 MR. MARUTOLLO: Good afternoon, your Honor. Joseph
9 Marutollo, Assistant United States Attorney, for the United
10 States.

11 THE COURT: Good afternoon, gentlemen. Be seated.
12 We are here for an ex parte hearing in this case. I
13 note that it's a closed courtroom, although there are some
14 additional individuals in the gallery who I believe are
15 representatives of the Government as well as one of my law
16 student interns.

17 MR. BLUME: That's correct.

18 THE COURT: Thank you. So, I've reviewed your
19 application for a temporary restraining order and an order to
20 show cause as well as your accompanying submissions that are
21 related both to the TRO request as well as your request for a
22 preliminary injunction. I have some clarifying questions for
23 you on a number of matters.

24 So, first question I have for you is I understand
25 from your submissions that the Defendants are still actively

1 marketing these devices, the FRT-15s to their prospective
2 customers, as well as the allegation in your complaint that
3 many of these devices are being resold by third parties to
4 other individuals.

5 But it's also my understanding, and this came later
6 in your submission, that the FRT-15 is not currently for sale
7 on the Defendants' website as of today, either on the website
8 or through any other place the Defendants control; is that
9 correct?

10 MR. BLUME: Yes, your Honor, it's our understanding
11 that they're out of stock. You can still purchase an FRT-15.
12 You would have to go through -- and, in fact, we've purchased
13 them recently -- you would have to go through a third-party
14 dealer. That's correct.

15 Now, they will take -- by "they" I mean Rare Breed
16 Triggers, on their website, they will put you on a mailing
17 list, or waiting list is a better way to put it, so that as
18 soon as they get stock they will provide it to you.

19 THE COURT: So that as of today -- you can be
20 seated. Just speak into the microphone.

21 MR. BLUME: Okay.

22 THE COURT: As of today, of course, if I granted
23 your request for a TRO, it would be in effect for at most 14
24 days, potentially less, the only individuals to whom it's
25 directed don't actually have the ability to sell the weapons

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1 right now. I realize that could change if they get it back in
2 stock tomorrow or next week, but I wanted to clarify that
3 fact.

4 MR. BLUME: Yes, that is our understanding.

5 There is one other fact. They continue to actively,
6 as we understand it, try to get additional product, whether
7 through looking for an additional manufacturer or -- I'll stop
8 there, but the short answer to your question is that's
9 correct.

10 THE COURT: And I did see, because I looked at this
11 section of the website that you had directed me to, that they
12 are still taking names for people who want to buy it, they
13 could get them in stock tomorrow and get additional product,
14 and the people on their waiting list can get shipments as
15 early as this week.

16 MR. BLUME: Yes.

17 THE COURT: So, it looks from your submission as
18 though at this time the FRT-15 is the Defendants' only product
19 that they're selling. So, if I were to grant your request for
20 an ex parte TRO, am I right that it would effectively shut
21 down their business all together?

22 I'm not saying that's outside the scope of the *Fraud*
23 *Injunction Act* or what I can do, but I just want to clarify
24 what the potential impact is.

25 MR. BLUME: Our understanding is that this is the

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1 only product that they sell. Currently. I'll qualify that
2 with a "currently." That is our understanding.

3 THE COURT: Thank you. So, my next question is
4 about what I can legally consider in terms of the scope of the
5 potential harm, particularly the immediate harm.

6 So, obviously, as is very clear in your papers,
7 you're bringing this case under Section 1345, the *Fraud*
8 *Injunction Act*, which is, of course, a civil statute. But you
9 begin your complaint by talking about not fraud but really
10 the, as you cite, the plague of injuries from gun violence and
11 particularly from semiautomatic weapons, which are by and
12 large legal in some cases, but the additional potential harm
13 that could happen if these devices that, as you allege,
14 transform an AR-15 into a machine gun are on the market.

15 I'm not in any way disputing that these are
16 legitimate public safety concerns and they go to what the *NFA*
17 and *Gun Control Act* are designed to regulate and also what the
18 ATF is empowered to regulate. I just wasn't sure, and I'd
19 love you to address that, whether I can consider that as a
20 particular harm since the *Fraud Injunction Act* is really
21 enjoining the fraud.

22 And I think to be more specific, whether I can
23 consider the threat of additional deaths or injuries that
24 might result from the sale, as opposed to the specific harm,
25 and it's still potentially a harm, to consumers who purchase

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1 the weapons under what you allege are false pretenses because
2 that seems to be the harm, the latter, that the *Fraud*
3 *Injunction Act* is designed to address.

4 MR. BLUME: Well, consider that both in our -- the
5 *Fraud Injunction Act* covers a number of predicates. Included
6 among them, of course, as you identified, are fraud statutes.

7 In addition, one of the predicates is the straight
8 conspiracy statute, 371, but only the Klein conspiracy part of
9 it. That covers interference with government operations,
10 which here -- I hope we got across which here we believe
11 includes protecting the public from the harms that are caused
12 by or could be caused by this product.

13 The ATF can't track these. They can't follow where
14 these are going. That is part of their mission. And that, we
15 believe, and that is what we're presenting to you, we believe
16 that is part of what the Defendants are impeding. And that
17 too is covered by 1345, although I recognize it's in the fraud
18 title -- fraud --

19 THE COURT: Chapter.

20 MR. BLUME: In the fraud chapter, it's called the
21 *Anti-Fraud Injunction Act*, but it does cover this. And it
22 specifically covers the ability of the Government really to do
23 its job. And here, the relevant government agency is ATF, and
24 part of the job is to keep people safe.

25 So, yes, we believe you can consider that.

1 THE COURT: Do you have any cases or authority in
2 which a Court has actually considered a nonconsumer,
3 nonpurchaser harm, particularly in the public safety realm
4 under the *Fraud Injunction Act*?

5 Because I didn't look specifically, but I didn't see
6 one in your papers. And it seems as though typically, the
7 protective groups are victims of telemarketing schemes, bank
8 fraud, that sort of thing.

9 MR. BLUME: I don't have anything to present to you
10 today. I know you're taxing my memory a bit, but I am certain
11 that we looked at for the very reason you are suggesting. And
12 if we had something like that, we would present it.

13 Perhaps this goes without saying, it's still covered
14 under the statute. Even if it hasn't been considered before,
15 we think it's fully within the scope of what the statute is
16 trying to address.

17 THE COURT: Okay. So, I have some more questions
18 for you, but let me just tell you at the outset kind of where
19 I'm leaning on this request.

20 So, I think your complaint and all the supporting
21 materials, which I reviewed very closely, make a strong case
22 that Defendants have violated and are continuing to violate
23 each of the fraud statutes and the conspiracy statutes that
24 you cite, both involving the lawful functions of ATF and
25 related agencies as well as the deceit or fraud that they seem

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1 to be perpetrating from the allegations you submitted, which,
2 of course, they haven't responded to yet, on individuals.

3 I think that I had some questions about whether the
4 probable cause standard or the preponderance standard applies
5 either with respect to your TRO request or your motion for
6 preliminary injunction. I think either way, based on what is
7 currently an unrebutted, albeit ex parte, record, you seem to
8 meet it.

9 And there are specific instances of the Defendants'
10 conduct you set forth, the most important of which seem to me
11 to be those that occurred after ATF publicly classified the
12 FRT-15 as a machine gun back in July of 2021 and gave the
13 Defendants notice via a cease and desist letter that same
14 month that this was an illegal product, essentially.

15 And I think among those facts, the Defendants
16 stating on their website that the device is, quote,
17 "absolutely not," unquote, a machine gun, Defendant DeMonico's
18 conduct in removing materials from the 3rd Gen facility which
19 he knew were subject to seizure, as well as the Defendants'
20 statements that the ATF has no authority to address any FRTs
21 currently in circulation.

22 And though I may want a bit of information on this,
23 I think the points you raise regarding their corporate
24 structure and governance during that time period, which,
25 combined with their alleged failure to pay taxes, seem to

1 raise a very strong inference and in my mind most likely a
2 preponderance of a Section 371 conspiracy due to fraud as well
3 as violations of the other statutes.

4 On the other hand, a TRO is, as you know, an
5 extraordinary remedy, to be granted ex parte only when in the
6 absence of a TRO immediate and irreparable harm will occur. I
7 am aware of the District Court case law in this Circuit that
8 says that irreparable harm is presumed when the statutory
9 criteria under Section 1345 are satisfied. I do think that
10 you've pled facts that suggest the Defendants have defrauded
11 both their prospective customers and are engaged in a
12 conspiracy to defraud the U.S. and, as I said, obstruct the
13 ATF's lawful functions.

14 But the real purpose of the *Fraud Injunction Act* is
15 to enjoin the ongoing frauds. And even though there are still
16 these statements on their website, since no customer can as of
17 today be misled into immediately purchasing an FRT-15 from
18 them, I'm concerned that a TRO may not be necessary or
19 appropriate at this stage given that this is an ex parte
20 proceeding. At most, it would be in effect for 14 days, maybe
21 less. And I think I would have the discretion to grant it,
22 but this seems to warrant caution given the extraordinary
23 nature of the ex parte relief and the fact that these aren't
24 for sale right now.

25 I do note at least one of my colleagues,

1 Judge Komitee, in a case a couple of years ago in a different
2 1345 case declined initially to enter the Government's TR0 as
3 written until the Defendants had been served. That was in the
4 case *U.S. v. Palumbo*, 448 F. Supp. 3d 257, from 2020. And
5 there, Judge Komitee declined to enter the TR0 without notice
6 but took it up again very soon thereafter, after the
7 Defendants were served, and there was a more limited TR0 he
8 entered with the consent of both parties.

9 I'm not anticipating, given the history, there would
10 necessarily be consent, but at this point I'd be more
11 comfortable entering injunctive relief after they've at least
12 been noticed and heard. And I would be inclined to direct you
13 to serve them and schedule a very prompt PI hearing. And we
14 could even have an initial status on video kind of to get a
15 sense of where things are. In the meantime, if the Defendants
16 start to sell this device again in the way you describe, you
17 can renew your request, and this would, of course, be without
18 prejudice to renew.

19 So, I'd like to hear from you as to what you think
20 of that potential outcome. I know it's not all that you are
21 seeking, but if you have any objections or things you think I
22 haven't considered.

23 MR. BLUME: Well, give me a moment. I have a few
24 thoughts that I'd like to share.

25 First, the product is -- Defendants are actively

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1 seeking to get the product. We don't know right now what
2 access they have to inventory. And given their history, we
3 fear that should they get ahold of anything, they're going to
4 get rid of it.

5 We also have some --

6 THE COURT: You feel they'll get rid of it.

7 MR. BLUME: They'll sell it as soon as they get it.

8 We have some concerns about their maintaining
9 records, especially given what they have done in the past.
10 Many of the things that you have already identified that we
11 note in our papers, their corporate structure which implies
12 certain things, their taking materials from 3rd Gen that were
13 subject to seizure, those are things that we would have some
14 concerns about that prior to some Court order, that we would
15 lose the ability to ensure that they're still going to be
16 there, and in particular tracking some of the sales of the
17 products to people. We don't know where these products are
18 going.

19 I recognize that the -- what I'm about to say
20 doesn't address their sales, but you can easily purchase this
21 product online from many, many dealers. And we've had a
22 shipment come in as recently as this past Friday. This, I
23 recognize, is not directly addressing Defendants, but it
24 certainly could be directed to the world, the larger consumer
25 base, that these are a problem, don't buy them.

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1 And if nothing else, it will -- that kind of signal,
2 and I recognize it will be short lived and not definitive
3 Court order, the Court order as to the classification of this
4 product, it would go along way towards signaling to the
5 consuming public that the classification -- the ATF
6 classification is important, you have to heed it, you don't
7 just listen to what the Defendants say on their website about
8 whether this is legal or not legal. That kind of thing sends
9 an important message.

10 Now, if there are -- if you would also consider
11 other aspects of the TR0 that -- put aside whether stopping
12 the sale, which, by the way we don't agree with, but put that
13 aside for a moment.

14 THE COURT: Meaning that you think something is
15 necessary to stop the sale because they could get back in
16 stock tomorrow.

17 MR. BLUME: Yes.

18 Not conceding that point, you could also, and I
19 suggest that if you don't want to do that, we'd like you to
20 very much consider requiring that they hold on to records.
21 Perhaps, although it's not written in our proposed order,
22 perhaps having something on their website where they can't
23 take any more orders or maintain their mailing list anymore.
24 Something that will at least recognize if your concern is you
25 don't have products right now, so, therefore, the Court

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1 doesn't have the authority to stop the sale, there are things
2 that you are still doing that we can stop and all within I
3 think the fair rubric of the statute.

4 One moment.

5 THE COURT: Sure, take a moment.

6 MR. BLUME: So, although --

7 THE COURT: Not taking any more orders is in essence
8 enjoining the sale, but what are you thinking that's short of.

9 MR. BLUME: Even maintaining a mailing list.

10 Anything short of that? They're maintaining a
11 waiting list. I don't know why they would -- that's an
12 ongoing marketing and sale product.

13 THE COURT: I would have, I think, greater First
14 Amendment concerns about telling them what lists they can or
15 can't maintain or what information they can or can't possess
16 or share, even if they just want to send a blast to everyone
17 saying: We disagree with this judge's order, but right now we
18 can't sell to you.

19 It does seem that if I were to agree with the thrust
20 of the argument you're making now the more straightforward and
21 less problematic approach would be to do what you originally
22 asked, which is to enjoin the sale. But I guess my question
23 is short of that, with regard to the records, are there things
24 that would stop the harm in the short term?

25 I think with respect to the records, under the

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1 Federal Rules, once they're served with your motion for
2 preliminary injunction, they're barred from destroying records
3 that relate to the subject matter of the litigation. There's
4 also some criminal statutes that -- I don't see any reason why
5 if I scheduled an order to show cause hearing on your motion
6 for preliminary injunction I couldn't include in the order
7 that they are barred from destroying any records, electronic
8 or otherwise, of past or prospective customers, people on the
9 wait list, anything related to.

10 And we could look at the language you propose and
11 see if there's anything else that needs to be included, both
12 under the applicable criminal statutes and under the Federal
13 Rules.

14 But keep going. I wanted to...

15 MR. BLUME: I agree that the cleaner way of
16 addressing that is to stop the sales. That's why, of course,
17 we suggest that you do that. Perhaps it goes to the point you
18 were making earlier, which is if, in fact, they don't have any
19 sales and if there is a balance of the harm. It seems to me
20 there isn't any harm on their end at this point.

21 And we are prepared to move as quickly as the Court
22 asks us to. Folks can serve -- in fact, they're waiting to
23 serve the Defendants. There's folks in place that can do
24 that, so we can get that done quickly. I can't promise you
25 this afternoon, but it will happen fairly quickly.

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1 THE COURT: Okay.

2 MR. BLUME: And our office is prepared to move
3 forward on any schedule that you suggest.

4 THE COURT: All right.

5 MR. BLUME: Can you bear with me one second?

6 THE COURT: Absolutely, take your time.

7 MR. BLUME: Thank you for indulging us.

8 (Pause in proceedings.)

9 MR. BLUME: If I may, a few things my colleague
10 shared that I'd like to share.

11 One is that it's our understanding -- I recognize
12 this is not in the declaration. If we need the agent to
13 testify to that, that's fine. His understanding of the way
14 the wait list works is that if you are a prior purchaser, you
15 will be notified separately. So, although we see the
16 public-facing website, we are not sure whether they have some
17 inventory that they are selling that we're not seeing. That's
18 possible.

19 THE COURT: How does the order in which they sell
20 the product that they obtain in any way change what's on the
21 website?

22 Meaning they might have a private stash or inventory
23 that they're notifying individuals on?

24 MR. BLUME: Exactly.

25 They may have -- imagine I'm a prior purchaser. I

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1 go on the site today or, better yet, I went on the site last
2 week. I get on the mailing list. It turns out, I'm a prior
3 purchaser. They grab it, they have inventory, they notify me
4 immediately, and I purchase it, which we wouldn't necessarily
5 see on the public-facing website. There would be some sort of
6 communication on the side. That's our understanding.

7 So, we are not -- best as we can tell the website
8 says they are out of stock, but it's possible that there are
9 purchases happening that we don't know about.

10 There is an ongoing -- we would --

11 THE COURT: Let me just say on that front, I think
12 it's possible and hard to know how likely it is, but given
13 that they are eagerly taking customers for the wait list and
14 promising folks that they will sell them as soon as they get
15 them in stock, if they had a separate supply that they were
16 separately selling, hard to see what their incentive would be
17 not to tell their customers that, but I agree with you, you
18 can't rule out that possibility if, indeed, there is some
19 information that they are selling it through another channel.

20 MR. BLUME: Their history -- well, it would be the
21 same channel, it's just that we wouldn't necessarily see it so
22 quickly.

23 Their history is to sell until they run out of
24 inventory, put that out-of-stock on, and put it up again. It
25 may happen in a way that's quicker.

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1 THE COURT: Right.

2 MR. BLUME: We also want to highlight again the
3 ongoing obligation that we believe the company has both to
4 register all of the sales, to pay the taxes for all of the
5 sales, none of which is happening. That is a continuing
6 violation and it's ongoing. That obligation hasn't gone away.

7 THE COURT: And is the concern with irreparable harm
8 even within a few days that those, because they are
9 essentially selling these on the black market and not paying
10 taxes and not recording the sales, or reporting them I should
11 say, to the Government that you may never learn if they're not
12 enjoined who they sold it to and, therefore, be able to give
13 those individuals an opportunity to divest or collect the
14 taxes?

15 I mean presumably, if in a week I were to hold a
16 hearing and direct them to turn over those records as part of
17 some expedited discovery, if they had just sent a package
18 today to a prospective customer you would be able to get those
19 records.

20 MR. BLUME: It's a fair point. We're really talking
21 about the ongoing nature of what they're doing and that is
22 their failure to pay and register and so forth. Yes, post
23 hoc. We can't disagree with what you suggest.

24 We do note a few things about Judge Komitee's case,
25 the *Palumbo* case. It was ultimately a telemarketing fraud

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1 case. The company, as we recall it, the judge had some
2 concerns because the company itself may have been operating
3 both legally and illegally. It wasn't just one -- a business
4 that all they did was engage in something illegal. I believe
5 he may have had some concerns about the fact of shutting down
6 a business that, one, was partly operating legally, and had a
7 number of employees.

8 We don't believe that's true here, meaning to the
9 extent that there are employees there are very few, if any,
10 and they are either actively involved or in -- in what's
11 happening, these aren't -- I don't want to go too far in
12 characterizing defendants, the folks we have not named as
13 defendants, but it's a very small operation.

14 THE COURT: And if they're not selling anything
15 currently anyway, their salaries are being paid whether the
16 sales are happening or not. So, issuing an order tomorrow
17 doesn't put a lot of telemarketers or their device-selling
18 equivalents out of work because their business, what they're
19 currently employing people to do is take names for a list,
20 whatever else they're doing.

21 I don't think I could stop them from collecting
22 names of interested customers as long as those records are
23 maintained, but I hear your point that the impact on the
24 employees is not the same.

25 MR. BLUME: And, finally, it's just the nature of

1 the product. We do consumer fraud all the time. It's very
2 important. We don't like people having money stolen. But
3 these are machine guns. And we have an ongoing and real
4 concern about any single one of these ending up in the wrong
5 hands. That's a fear we all have.

6 And that product makes it slightly -- not slightly,
7 it makes it, we think, significantly and materially different
8 from a telemarketing fraud kind of operation, and we do think
9 that should be considered.

10 THE COURT: Okay. Thank you.

11 Let me then ask you some additional questions about
12 some of the facts and the arguments that you raise in the
13 papers.

14 So Rule 65, both with respect to a TRO and a PI,
15 requires the injunction must be stated with specificity. And
16 there's a fair amount of case law in the Circuit that
17 discourages district judges like me from entering injunctions
18 that simply order a defendant to obey the law on the grounds
19 that they're unconstitutionally vague, don't put them on
20 notice of what's prohibited.

21 I understand the portions of your proposed TRO,
22 points six and seven, that are more specifically directed to
23 acts, but I am concerned that points one through five, at
24 pages two and three of your proposed order, that simply direct
25 them not to commit these acts are both superfluous and

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1 potentially unlawful.

2 So, how strongly do you feel about including those?

3 And is there a way to convey the message or the
4 prohibition I should say that you seek to convey just
5 including the latter two points or through some other means?

6 Feel free to take a moment to look at those.

7 MR. BLUME: I know exactly the relief you're
8 referring to and I'm looking more at the findings.

9 THE COURT: Right.

10 MR. BLUME: And if you were inclined not to have, as
11 you put it, and I understand your concern, an obey-the-law
12 injunction, that there could be more specificity in the
13 findings, that instead of -- it could be mentions of facts in
14 the findings or -- yes, specific facts, I suppose, would be
15 the way to do it.

16 THE COURT: So, I think we covered some of this
17 already, but I do think that under Rule 37(e) of the Civil
18 Procedure rules parties have to preserve electronically-stored
19 information that they reasonably should know should be
20 preserved in the anticipation of litigation. And certainly
21 now that you've filed your complaint, litigation has begun.

22 There's also 18 U.S.C. Section 1519 which prohibits
23 the destruction of evidence if the party knows or has reason
24 to know that they may be the subject of a federal criminal
25 investigation, which I don't think is disputed here given the

1 history with them and ATF.

2 But do you think there's sufficient notice to them
3 that they may be the subject of criminal proceedings?

4 MR. BLUME: I don't know that there's been anything
5 specific. I think it would be -- I frankly don't know all the
6 elements of the statute that you cite, so I'm not sure what
7 kind of notice they need. But at the moment, it would seem to
8 me that if all they're served is our papers, it's in the
9 criminal titles, there are criminal penalties that we talk
10 about, they have been served with one cease and desist and one
11 follow-up letter which essentially says these are criminal
12 penalties.

13 THE COURT: Right. In the cease and desist letter
14 from way back in 2021, you said that essentially you're
15 breaking the law, the federal criminal law, by violating the
16 *National Firearms Act* and the *Gun Safety Act* that prohibits
17 the sale of these devices because of how ATF has classified
18 them.

19 MR. BLUME: Perhaps I'm anticipating a question you
20 haven't asked me.

21 THE COURT: Go ahead.

22 MR. BLUME: They have shown so far little regard for
23 general principals of law. By that I mean they clearly
24 understand that the ATF has said something, and they're
25 ignoring it; more than ignoring it, they're actually impeding

1 it. Their manufacturing company 3rd Gen was searched. You
2 need a court order for that and you need probable cause that
3 there's a crime being committed, among other things. And
4 still they have interfered with that.

5 So, the notion that they would comply with the sort
6 of general rules of discovery, requirements of discovery, we
7 have concerns about. And they have shown that they haven't
8 done it in other similar context. So, a court order we think
9 would be both justified and more likely to be complied with.

10 THE COURT: Having reviewed the record, I understand
11 the basis for that concern.

12 All right. So, let me ask you a question about the
13 core of the injunctive relief you're asking for. This is your
14 point six, barring them from engaging in the sales.

15 You know, if you read Section 1345 literally, it
16 limits my authority to enjoin fraud specifically. I realize
17 there's the conduct that is impeding the lawful government
18 function, but I am wondering, and there may be an answer to
19 this, that if the Defendants removed the allegedly misleading
20 statements from their website and their marking materials but
21 sold the product anyway, if somebody just called them up and
22 said, hey, I hear from one of the blogs I'm on or newsletters
23 I'm on that you're selling this RFT-15 and the Defendant
24 filled the order without marketing it in the way that had
25 these deceptive statements about it's legal, the ATF has no

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1 authority, it's perfectly fine, it's not a machine gun, but
2 simply placed the order, they might be in violation of the
3 criminal law, but why are they committing fraud?

4 MR. BLUME: At that point, let's assume for
5 argument's sake they're not committing mail or wire fraud.
6 They are still not complying with any number of requirements
7 under the *National Firearms Act* and *Gun Control Act*, which
8 include, among other things, registering all these products,
9 registering the transfer of the products, putting serial
10 numbers on the products, paying taxes for the products, all of
11 those things that go towards not just revenue for the
12 government but really the safety aspect of this.

13 THE COURT: I don't dispute that at all.

14 I guess the question is and it may just be that
15 there is some implicit or direct fraud in selling a product
16 that they have been specifically advised by the applicable
17 government agency is illegal to sell or a way in which the
18 actual sale is impeding the lawful function of the ATF because
19 it prevents the ATF and the IRS from doing its job do to both
20 track, regulate, and tax these items.

21 I just want to have you crystallize for me a little
22 bit why enjoining the sale per se rather than simply enjoining
23 the statements, the deceptive mailing, that sort of thing,
24 actually is covered by the statute.

25 MR. BLUME: Let me start by saying I think the

1 statute is -- the language of 1345 is somewhat broad in
2 allowing for the Court to -- actually, I have it here.

3 It allows for any restraining order or prohibition
4 to prevent the continuing substantial injury to the United
5 States. And that is broad language and Courts have used that
6 in a number of contexts to enter admittedly perhaps broad
7 injunctions.

8 And the injury here is beyond just fraud to
9 consumers, which we believe exists, and to the ATF. These are
10 products that have been, specifically in our view,
11 specifically banned for anybody other than somebody in the
12 military or for local or federal law enforcement. In our
13 view, this is -- in their records it's a trigger, but it's a
14 machine gun. And you're not allowed to have it and let alone
15 sell it.

16 And for us, 1345 allows it. That's an injury, to
17 have these products out there in the world.

18 THE COURT: I would think within a little closer --
19 I hear you on that point, but even closer to the letter of the
20 statute is that each product that's in circulation without
21 your knowledge and done in a fashion that is illegal and not
22 reported to the government prevents the government from
23 contacting those individuals and providing them with an
24 opportunity to legally divest from them is one opportunity.

25 MR. BLUME: Thank you, yes.

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1 THE COURT: So, the actual sale is, one, harm, but
2 more closely hued to the purpose of the fraud statute.

3 And I thought one thing that was quite compelling in
4 your papers, both as to the venue of the Eastern District as
5 well as to the overall harm from Defendants' fraud, was the
6 evidence you presented that individuals in New York and
7 elsewhere, when properly notified of the prohibition on these
8 items the ATF's classification of them, had voluntarily
9 availed themselves of the opportunity to divest because they
10 did not want to be in the possession of an illegal weapon,
11 many lawful gun owners have reason to be quite concerned about
12 that out of fear that if they commit a crime by possessing an
13 illegal weapon they might lose their right to possess a legal
14 one because those who commit firearm-related offenses can
15 lawfully have their Second Amendment rights restricted.

16 So, in some ways falsely marketing these illegal
17 products to those who want to purchase them under false
18 pretenses can actually harm the rights of those who are
19 seeking to possess weapons in compliance with the law.

20 Is that a fair statement?

21 MR. BLUME: Yes. Thank you. We'll leave it at
22 that. Thank you, your Honor.

23 THE COURT: Let me ask you a little bit more about
24 this question of the standard of review under Section 1345.
25 Really, the standard of proof that I alluded to earlier.

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1 So, you cited a few District Court cases that
2 suggest that all you need to demonstrate is probable cause.
3 But I haven't found any Second Circuit or Supreme Court case
4 law to support that proposition. Most of the cases that we've
5 seen -- well, most of the cases in the civil context suggest
6 that both a TRO and a preliminary injunction should be granted
7 when a Court is satisfied by a preponderance of the evidence
8 that the government's met its burden. And I think in the 1345
9 context, in the *Legro* case from the Fifth Circuit, 2008, that
10 you cited, it seems that that Court sort of set forth why this
11 is at best an open question.

12 So, what is the principal reason for why a probable
13 cause standard should apply in this context?

14 MR. BLUME: It was Congressional intent. The
15 legislative history of 1345 is laid out fairly well in one of
16 the cases we cite, but I'll give you the short of it.

17 1345 is actually a follow-on to an earlier statute
18 that allowed the Postal Service itself to stop the use of the
19 mails for frauds. That statute was long held to allow them to
20 do that under a probable cause standard.

21 When 1345 was enacted back in the seventies, one of
22 the reasons --

23 THE COURT: Sorry, what the was statute that was
24 long in effect before 1345?

25 Take a moment.

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1 MR. BLUME: I'm pretty sure it's either
2 18 U.S.C. 3077 -- I'm sorry, your Honor, I don't have this at
3 my fingertips.

4 THE COURT: Take a moment, that's fine.

5 MR. BLUME: What I'll do, your Honor, perhaps after
6 the argument I can provide it to you.

7 But there was a predecessor statute, and that
8 statute had as a base the Postal Service could stop these kind
9 of frauds just under a probable cause standard. In enacting
10 1345, Congress was trying to broaden the reach of that
11 original statute. And given that history, given the knowledge
12 of what the standard was on the earlier statute, and the fact
13 that they wanted to expand its reach, Courts have held that it
14 must, of course, mean that Congress' intent under 1345 was to
15 allow an injunction under a probable cause standard.

16 If you think a little bit, I suppose, about the
17 reasons for the statutes in the first place, what the sort of
18 larger context of them are, they are to stop harm as quickly
19 as possible while the Government continues investigations into
20 the activity and that there's a recognition from Congress that
21 that may take some time, and in the meantime, under certain
22 circumstances, it makes good sense, good policy, sense to stop
23 the harm, whether it's the government or individuals, while
24 that investigation is going forward.

25 Beyond that, there's the recognition that the

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1 continuing investigation means that the Government doesn't
2 have, perhaps, all of the evidence that they would otherwise
3 have access to given either time or other kind of resources.
4 So, to put the standard at the admittedly lower standard than
5 a preponderance also makes some sense as it recognizes that
6 the Government's still gathering facts about what's happening.

7 THE COURT: All right. I'll take a look at the
8 statute and the history.

9 There is a bit of a concern that when you combine it
10 with the presumption that in the context of fraud, there's a
11 presumption of irreparable harm without the Government having
12 to affirmatively demonstrate it combined with an even lower
13 probable cause standard, we're getting into an area of very
14 minimal standard of proof or minimal burden on the part of the
15 Government to get extraordinary ex parte relief.

16 So, let me ask you this: Is there -- go ahead.

17 MR. BLUME: Your Honor, I was just going to say on
18 Page 18 and 19 of our brief, we cite to the cases. And the
19 case I think that would really -- is worth looking closely is
20 *US v. Belden*, which goes through the legislative history of
21 the statute.

22 THE COURT: I'm sorry, I'm looking at 18 and 19 of
23 the complaint. Is there a different --

24 MR. BLUME: Oh, our brief, our brief.

25 THE COURT: Yes.

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1 MR. BLUME: It's *United States v. Belden*, 714 F.
2 Supp. 32.

3 THE COURT: Start from the beginning.

4 MR. BLUME: *United States v. Belden*, B-E-L-D-E-N,
5 714 F. Supp. 42. And it's from the Northern District of New
6 York and it goes through the legislative history. You'll
7 probably find that I've miscited the initial statute, but it
8 should be in there.

9 THE COURT: It's all right.

10 MR. BLUME: And one other point to make is as far as
11 we're aware, this is the standard that's -- we have not seen
12 any other cases that says there's some other standard here,
13 that it's anything other than probable cause.

14 THE COURT: Okay. Thank you.

15 Are there any wrinkles to applying a preponderance
16 standard -- I take it your contention would be that you meet
17 the preponderance standard if I decide that's the one to
18 apply.

19 MR. BLUME: Yes, we do.

20 THE COURT: Are there any specific considerations
21 regarding application of a preponderance standard where only
22 one side has presented evidence, meaning in the ex parte
23 context?

24 That may be the reason why probable cause is the
25 standard, because that is typically one that's applied when

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1 the Government is seeking relief from the Court in an ex parte
2 proceeding.

3 MR. BLUME: Sure. I suppose the concern would be we
4 don't think it's correct; that the statute itself, although it
5 doesn't specify the standard does -- conflate is the wrong
6 term, but use preliminary and temporary relief in the same
7 sense, it doesn't distinguish between the two, or permanent,
8 for that matter. And we would have some...

9 I suppose it's an answer that applies in the broader
10 context, which is because we think it's not the right
11 standard, we certainly don't want a Court out there, someone,
12 you know, or a jurist say that if you have a decision, it's
13 probable -- a preponderance under certain circumstances. We
14 wouldn't like that.

15 THE COURT: Right.

16 MR. BLUME: We do think we meet it. But we also
17 think that the standard is probable cause.

18 THE COURT: Let me ask you a few more factual
19 questions.

20 I did note one aspect of the history of the
21 Government's back-and-forth with Defendants about whether
22 these products are legal or not and can be sold. If I
23 understand it correctly, some time before the Defendants began
24 to sell these devices in December of 2020, they hired some
25 private sector individuals, including one or more former ATF

1 agents, to give an opinion, allegedly, that their device
2 passed muster and was not a machine gun. And then you noted
3 in your complaint that it's customary for a weapons
4 manufacturer to submit its product to ATF for approval.

5 Is that submission process required or simply
6 customary?

7 Is it something like the FDA, where before somebody
8 sells a food or drug they have to get it approved by the
9 relevant agency?

10 MR. BLUME: No, it's not required.

11 I would perhaps give a little more color to that.
12 It is customary. The Defendants acknowledge that, meaning
13 they in their own web publications, I guess is one way to put
14 it, they are clear that that is the custom. They also
15 acknowledge that their customers recognize that as the normal
16 course. But no, it isn't required.

17 It happens all the time. It happened to the product
18 that was the predecessor to this. So, although not required,
19 the customer base here would have expected it.

20 THE COURT: I think whether or not it's required, I
21 understand your argument to be that even if they declined to
22 submit the product for approval to ATF, did their own private
23 classification in 2020, thereafter, in 2021, when ATF on its
24 own obtained some of these devices Defendants were selling,
25 tested it, made a determination that these were machine guns,

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1 and put the Defendants on notice, whether they submitted it to
2 AFF or not, they can't just disregard ATF's determination and
3 falsely tell their customers that there's no question that
4 these are legal and ATF has no authority to classify them.

5 MR. BLUME: That's correct.

6 THE COURT: Let me just ask you about the mailing
7 issue and these mislabeled packages under the name Red Beard
8 Treasures, which in your papers you allege that the Defendants
9 deliberately mislabeled these packages under a false name to
10 avoid detection and conceal that they contained these FRT-15s.

11 I am aware that there are circumstances where
12 companies selling perfectly legal products might sell them on
13 their websites and then put them in the mail under a truncated
14 name, a different name, other than the name of the lawful
15 company to protect the privacy of the people they're selling
16 it to. For example, a company selling hair regrowth products
17 might want to market them to men or women who are facing hair
18 loss and don't want everyone to know, want their neighbors to
19 know, that they're buying hair loss treatment, or certain
20 books or magazines that are perfectly legal to sell.

21 Why is RBT doing so here specifically evidence of
22 fraud or is it just an additional fact in combination with
23 everything else that is entitled to some consideration?

24 MR. BLUME: It's our view that it's not because
25 they're concerned about their customers, that they -- at the

1 time that they did this, which is November and December of
2 this past year, the last few weeks, was already after several
3 cease and desist letters, the seizure at 3rd Gen, 3rd Gen's
4 decision not to continue -- as we understand, not to continue
5 to manufacture these products, and their awareness that
6 consumers, their consumers, some of them have been visited by
7 ATF or have even turned their product over.

8 In our view, they did this so that anybody who might
9 look on the package isn't going to be alerted to the fact that
10 this is an illegal product that could be seized. Put it into
11 context, right, of the history.

12 And consider too that the e-mail that went out right
13 before these products, these particular products, were sold --
14 that was the November 22 e-mail -- talked about one of the
15 reasons -- well, in it, they mention that some of the money
16 we're going to use to challenge the ATF, we're going to use
17 some of this money to help people who have gotten product
18 taken from them.

19 So, they're telling people the ATF may come and take
20 your stuff and then they're putting the product in a box that
21 is mislabeled and, in our view, purposely mislabeled because
22 the whole -- at least as we understand it, they recognize that
23 the government knows what Rare Breed Triggers is and what's
24 being sold. So, they're trying to protect themselves, really.

25 THE COURT: Let me go into an area that wasn't

1 addressed in your brief but probably is at least back of mind
2 in any case involving an injunction or restriction on
3 possession of firearms, which is Second Amendment case law.

4 So, as the Government, of course, knows, this area
5 of the law has been subject to some significant developments
6 in recent years and there's considerable ongoing litigation in
7 this Circuit and elsewhere. My reading of the relevant
8 precedent, particularly *Heller* and *Bruen*, is that despite
9 these recent cases, the federal government clearly retains the
10 authority to regulate or ban machine guns.

11 And indeed, in *Heller*, the Supreme Court strongly
12 implied and came pretty close to flat out stating that nothing
13 in its opinion called into question the *NFA*'s restrictions on
14 individual possession of machine guns. And the Second Circuit
15 in the *Zaleski* case, 489 Fed. App. 474, Second Circuit, 2012,
16 cited *Heller* for that proposition that the Second Amendment
17 doesn't protect a defendant's or an individual's personal
18 possession of machine guns.

19 I haven't researched this extensively, though we did
20 do a preliminary look.

21 Is the Government aware of any case in any circuit
22 holding or suggesting that the *NFA*'s restriction on individual
23 possession of machine guns specifically is in any way a
24 violation of an individual's Second Amendment rights.

25 MR. BLUME: No. And we would have cited to you

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1 *Zaleski*.

2 THE COURT: You may not be aware of all of these,
3 but to your knowledge are there any ongoing challenges or
4 court cases pending addressing that question?

5 MR. BLUME: About machine guns? We're not aware of
6 any.

7 For what it's worth, your Honor, I don't want to put
8 words in the Defendants' mouths, but I don't think they would
9 suggest that -- I have not seen --

10 THE COURT: Their position -- of course we haven't
11 heard from them directly, but they've made considerable public
12 statements and they filed at least two lawsuits challenging
13 ATF's authority to restrict their sale. And as far as the
14 records you've provided and the public record from those
15 lawsuits, their challenge was based on the fact-based nature
16 of the classification and related conduct rather than the
17 ATF's authority to regulate or Congress' authority to ban
18 individual of machine guns generally.

19 MR. BLUME: That's correct, and I haven't seen
20 anything in any of the websites or materials that we may not
21 have shown to you that suggest anything else. That's correct.

22 THE COURT: Thank you. Let me ask you a little bit
23 about the process going forward.

24 So, there seem to be two possible paths I could take
25 here. One is to grant the TRO by written order with some

1 modifications along the lines we've discussed directed
2 specifically at the sale and marketing or one or the other of
3 these FRT-15s by Defendants as well as to enjoin them from
4 destroying any records, and then set it for a hearing within
5 the next 14 days and probably sooner than that, within a week
6 or so.

7 The other possibility would be for me to deny the
8 TR0 with leave to refile and then have you serve your motion
9 for preliminary injunction on them with an order from me for
10 the Defendants to enter an appearance and appear for at least
11 a preliminary conference if not full-on oral argument or an
12 evidentiary hearing on your motion for a preliminary
13 injunction.

14 Let's talk about both options and what the
15 Government thinks by way of additional evidence, witnesses,
16 argument you would need to proceed with more long-term relief
17 under either scenario.

18 And you did note in your papers something about
19 expedited discovery or additional discovery, so I'd like to
20 hear from you about the state of that record.

21 MR. BLUME: That's really where I was going, which
22 is that for a preliminary injunction, although we would be
23 prepared to argue today on the record that we have, we would
24 like the opportunity to have some limited discovery of the
25 Defendants to get a little more information about the history

1 of the product and about some of the marketing so that we can
2 perhaps, for want of a better phrase, make as complete a
3 record as we can to meet whatever standard you apply.

4 So, we would want -- and we'd also want to know how
5 much they sold, in part because of the tax implications, and
6 where they sold. If that's for preliminary injunction, I
7 think you -- I suspect you would want a little more in the
8 record about some of that.

9 So, we would, as I said before, we would go on
10 whatever schedule works for the Court.

11 THE COURT: If I did enter a TRO, though, I suppose,
12 though I haven't looked into it, I might be able to do
13 successive ones. But it would seem as though the Government
14 would take some risk that you would get what you want
15 initially, which is a TRO, we would set it for a hearing, they
16 might come in with all kinds of objections, need for
17 additional time, witnesses, the like, maybe additional
18 discovery on both sides, and then we might be in a position
19 where either I would hear argument on a preliminary injunction
20 on some kind of time-limited basis in anticipation of a
21 hearing on the merits or trial on the merits or the TRO might
22 dissolve and they would be back to the old state of affairs
23 but with additional notice that they cannot destroy any
24 records related to litigation.

25 So, what are the pros and cons from the Government's

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1 perspective of doing it that way?

2 MR. BLUME: Pros and cons, can I answer a slightly
3 different question?

4 THE COURT: Sure.

5 MR. BLUME: Which is that I suspect that what the
6 Defendants would want to do is present more evidence than we
7 think is necessary. I suspect that what they would want to do
8 is to argue here that this product isn't a machine gun. And
9 we're prepared to make you know to address that. I suspect
10 that they will want the time to pull that together, and we're
11 prepared to give them that time provided they stop selling.

12 So if you're willing to put -- enter the TR0, we can
13 talk to the Defendants immediately about what time do you
14 really need, what do you want to do to defend this, and we'll
15 give you discovery as appropriate. There may be discovery on
16 our side, there may not be. There are reasons why they may
17 not be entitled to certain discovery on our side, which we can
18 get to. But to give them the opportunity to challenge it as
19 much as you want and we'll take the time to do that, but in
20 the meantime you have to stop selling.

21 I think that may be a course that would be fair for
22 everybody. And, frankly, again I'm not talking about six
23 months from now, I'm more talking about instead of five or six
24 days but a little more time to give everybody the opportunity
25 to present what they want to present.

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1 THE COURT: Any other considerations or issues that
2 we haven't addressed yet?

3 If you need a minute to confer with your team,
4 please feel free.

5 MR. BLUME: Is it okay?

6 THE COURT: Feel free.

7 (Pause in proceedings.)

8 MR. BLUME: Your Honor, if I may.

9 THE COURT: Yes.

10 MR. BLUME: To give a little more color, little more
11 context, we have collectively been through this; not with this
12 product, but collectively 1345s. And our anecdotal granted
13 experience is typically the defendants will work with the
14 Government, with the Court, for a schedule. They'll agree to
15 a -- I don't know that that's what this group of Defendants
16 will do, but it is more often than not the parties work out
17 some schedule with agreed-upon extensions of these limited
18 TROs, even in circumstances where the TROs are much more
19 onerous. We've been in circumstances where these TROs involve
20 things like freezes of assets, where you can't spend any money
21 unless the Court lets you.

22 So, it would not be unusual, in fact, I think it
23 would be very much the usual course to enter a TRO, to work
24 out a schedule where the Defendants agree on some timeline,
25 they agree to the TRO in the meantime, and then they have the

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1 opportunity to defend it any way they want to.

2 THE COURT: Thank you. Let's take a ten-minute
3 recesses and then come back.

4 MR. BLUME: Thank you.

5 (Recess taken.)

6 THE COURT: Please be seated.

7 We're back on the record. I decided that I would
8 like to take the Government up on its offer to have the agent
9 testify briefly as to this issue of off-website sales or
10 prioritized sales for prior customers.

11 Do you need a few minutes to confer with him before
12 he takes the stand if that will make it go more smoothly?

13 MR. BLUME: A moment.

14 THE COURT: Sure.

15 (Pause in proceedings.)

16 MR. BLUME: We're going to have the special agent
17 come in, Dan Koneschusky.

18 THE COURT: Take the stand and I'll have the deputy
19 swear you in. Thank you.

20 THE COURTROOM DEPUTY: Please raise your right hand.

21 Do you solemnly swear or affirm that the answers and
22 testimony you're about to give to the Court will be the truth,
23 the whole truth, and nothing but the truth?

24 THE WITNESS: I do.

25 THE COURTROOM DEPUTY: Please state and spell your

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1 name for the record.

2 THE WITNESS: Special Agent Daniel Koneschusky,
3 D-A-N-I-E-L, last name K-O-N-E-S-C-H-U-S-K-Y.

4 THE COURT: Good afternoon.

5 THE WITNESS: Good afternoon.

6 **DANIEL KONESCHUSKY,**

7 called by the Government, having been

8 first duly sworn, was examined and testified

9 as follows:

10 DIRECT EXAMINATION

11 BY MR. BLUME:

12 Q Special Agent Koneschusky, can you just tell us where you
13 work?

14 A I work with ATF.

15 Q What is your responsibilities there?

16 A Primarily, to investigate crimes involving firearms,
17 firearms trafficking, and firearms offenses.

18 Q Are you familiar with company called Rare Breed Triggers?

19 A Yes, I am.

20 Q And what is your involvement, if any, with Rare Breed
21 Triggers?

22 A I have been one of the investigators who has been tasked
23 with investigating into Rare Breed Triggers FRT-15s and some
24 of their other products.

25 Q As part of that investigation, do you monitor social

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1 media?

2 A Yes.

3 Q And can you tell us a little bit about what you do when
4 you monitor social media?

5 A We look through social media groups and we look at
6 potentially chats or groups involving maybe firearms or
7 firearm sales may be taking place, and we kind of look through
8 that information.

9 Q And you do this personally?

10 You, personally, do you look through the chats?

11 A Yes.

12 Q And you've done that recently.

13 A Yes.

14 Q As recently as when?

15 A Throughout the course of the investigation over the last
16 few months.

17 Q Well, did you do it yesterday, for instance?

18 A For instance, for this particular thing, I did not do
19 this yesterday.

20 Q You've been doing it as recently as when?

21 A I've monitored -- most of the time when we monitor these
22 things, there are special investigation teams that do. A lot
23 of times what I'm looking at is more historical context after
24 a search warrant is done and records are received back from
25 us.

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1 Q I guess what I'm getting at is with respect to Rare Breed
2 Triggers -- let me start the question again.

3 Have you seen social media concerning Rare Breed
4 Triggers?

5 A Yes.

6 Q Have you seen social media concerning the sale of
7 FRT-15s?

8 A Yes.

9 Q And have you seen that discussion or discussions about
10 the sale of FRT-15s on social media?

11 A Yes.

12 Q Recently?

13 A Yes.

14 Q Do you want to give us a sense of how recently?

15 A Are we talking about when I physically put my eyes on it
16 or when the conversations themselves took place?

17 Q Tell us both?

18 A When the conversations themselves took place, I can't
19 recall.

20 But I saw these files probably last week.

21 Q Can you describe some of the discussion on social media
22 about the sale of FRT-15S that you saw?

23 A Some of the conversations that I saw were between members
24 associated with Rare Breed Triggers. And in the
25 conversations, my recollection is there was communications

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1 where they stated people -- individuals could go on wait lists
2 and that they would be -- you know, when product became
3 available, they would be notified.

4 I can't recall specifically if it was they were sent
5 a link or they were given some -- they were given some
6 additional opportunity to purchase these before the general
7 public was notified, my interpretation was before it would be
8 released on their website or shown available on their website.
9 So, they were basically given the first opportunity to
10 purchase them. That would be the FRT-15.

11 Q Let me try to unpack some of that a little bit. I don't
12 do social media.

13 These are discussions between what it looks like to
14 you folks who are either employed by Rare Breed Triggers or
15 working for them, those folks involved in the conversations?

16 A Correct.

17 Q With consumers?

18 A No.

19 Q No. Who are they having conversations with?

20 A Actually, if I may, I'm not sure if I can have a
21 conversation with you on the side or not, or no.

22 Q Not now.

23 THE COURT: You're on the stand.

24 The chat rooms that you're referencing, were there
25 prospective buyers or individuals who may have signed up to do

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1 it?

2 THE WITNESS: Not that I'm aware of.

3 THE COURT: Okay.

4 THE WITNESS: I believe it was internal
5 communications.

6 Q Internal communications among Rare Breed Triggers?

7 A Associates.

8 Q I see. Am I getting a sense that some of this
9 conversation included undercover operations or no?

10 A I don't believe there was undercover, but I'm not a
11 hundred percent on that.

12 Q These are discussions among Rare Breed Triggers'
13 employees?

14 A Yes.

15 Q About the --

16 A If I could maybe describe it different.

17 Q Please.

18 A Almost like a structure, an organizational way that they
19 want to sell the triggers, if I remember correctly.

20 Q And among those discussions were discussions about people
21 who are on a wait list for the FRT-15?

22 A Yes. I recall that there were some members involved with
23 Rare Breed Triggers. And I can't recall who everybody was
24 associated with this group. There were several people.

25 But that's my best recollection of the

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1 conversations.

2 Q But it was about the FRT-15.

3 A About the sale of the triggers.

4 Q And about the wait list of those?

5 A Correct.

6 Q The wait list to sell them?

7 A Yes.

8 Q And the discussion included a link or something like
9 that?

10 A I'm sorry, could you repeat that?

11 Q Sure. The discussion included --

12 A The discussions were just about the wait list and the
13 availability to purchase the triggers once they came back in
14 stock and that those people would be -- like I said, I can't
15 recall if they would be sent a separate e-mail or a private
16 link to purchase the firearms or just the first right to
17 purchase the firearms. But to my recollection, they were
18 given some way to purchase them prior to the general public
19 being made available to purchase these triggers.

20 Q Did they discuss at all what the Rare Breed Triggers
21 website would say about the sale?

22 A I don't recall.

23 MR. BLUME: Do you have any questions, your Honor?

24 THE COURT: I do.

25 So, let me ask you this, Agent. I did notice from

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1 the RBT website as of this afternoon, around 3:53 p.m.,
2 there's a section of the website with some questions and
3 answers that the Defendants appear to have authored.

4 One question reads: When will you have more FRT-15
5 triggers available?

6 And the answer posted below reads: We continually
7 manufacture and package triggers daily, so it's never more
8 than a few days before we add more to the stock level on our
9 website. If you catch us during a period when we're sold out,
10 please be sure to put your e-mail address on our wait list,
11 which can be found on the product page of our website. When
12 adding stock to our website, we notify customers on our wait
13 list in the order they signed up.

14 Is what I just read here any different than the
15 procedure you have just described that these representatives
16 of RBT were discussing in their social media chats?

17 In other words, is there something additional in
18 those chats beyond what they're talking about on this website
19 in terms of how they will prioritize sales or conduct the
20 sales to third parties.

21 THE WITNESS: I think that was the majority of what
22 the conversations were saying. It think it was more like a,
23 like I said, maybe a structural conversation of how it works,
24 what they intended to do. And I think that's a pretty fairly
25 accurate description of how it was and how it was going to go

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1 forward. They would be alerted once they were made in stock.

2 My interpretation of that at the time when I read
3 through it. And I could be missing something. There could be
4 something additional that I read that's just not jogging my
5 memory right now.

6 THE COURT: Do you recall sitting here today which
7 social media platform or platforms you were monitoring for
8 these communications?

9 THE WITNESS: It wasn't necessarily that I was
10 monitoring them, like actively as it was going on. It was a
11 historical conversations that I was reading.

12 And I believe it was a Facebook group chat.

13 THE COURT: So, it wasn't something you obtained
14 through a warrant, it was a group chat that you --

15 THE WITNESS: Not me personally, no.

16 THE COURT: When you say "not you personally," was
17 it something that one of your other agents or employees either
18 downloaded or printed out for you to review?

19 THE WITNESS: Yes.

20 THE COURT: And when you say you don't recall the
21 exact date and these were historical, can you estimate even a
22 time frame for how far back they went?

23 Are we talking three months? Six months? Two
24 years? Five years?

25 THE WITNESS: I wish I could. I, unfortunately,

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1 don't recall the dates.

2 There was a lot of records throughout this
3 investigation, and I just -- I have a recollection where I was
4 reading through it and I remember seeing conversations about
5 wait list and when products would be available and how they'd
6 be notified and things like that.

7 THE COURT: But to the extent these were older
8 conversations, more than a few months old, to the best of your
9 recollection what you observed in the Facebook group chats was
10 consistent with what's on the Defendants' website as I've just
11 read that to you today.

12 THE WITNESS: Yes.

13 THE COURT: Thank you. I have nothing further. You
14 can step down.

15 (Witness excused.)

16 THE COURT: Thank you very much, Mr. Blume and
17 Mr. Marutollo, for your submissions and for appearing today.

18 After reviewing the submissions, hearing your
19 argument, hearing the agent's testimony, I am going to grant
20 the Government's application in part for a temporary
21 restraining order under 18 U.S.C. Section 1345. I would like
22 to do so by written order with some modifications of the
23 proposed order that you've submitted.

24 I do find compelling your arguments both as to the
25 actual harm in the areas that the *Fraud Injunction Act* was

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1 designed to protect, both with respect to governmental
2 functions and the fraud on consumers that you've established.
3 Even apart from the presumption of irreparable harm in this
4 context, I find that you've established probable cause to
5 believe that there is specific and immediate and irreparable
6 harm from each day that these products are continuing to be
7 marketed and sold.

8 So, I will direct the TRO both to the sales, the
9 statements as to marketing, and I will further enjoin the
10 Defendants from destroying or altering any records of their
11 historical sales, their customer base, or their wait list.

12 I will not order a production of those at this time.
13 I think that's more appropriate to discovery and I'd like to
14 hear from them as to any privacy interests on behalf of any
15 individuals who've contacted them. Particularly in light of
16 their history of seeking to evade ATF's enforcement efforts, I
17 agree with the Government that a specific directive is
18 appropriate at this juncture.

19 What I would ask you to do is, of course, refrain
20 from serving them until I've issued the order. I would like
21 to set a video status in light of the fact that Defendants are
22 based out of state for next week.

23 Hold on one moment while I pull up my calendar.

24 How is Thursday, February 2, for the Government, or
25 Friday, February 3?

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1 MR. BLUME: I think the short answer is, your Honor,
2 we'll do anything that you want us to do.

3 THE COURT: That said, I have relatively flexible
4 schedules both days. I think we should aim for the afternoon
5 given that the Defendants may be on Central or Pacific time.

6 MR. BLUME: Your Honor, whatever works for the
7 Court.

8 THE COURT: Let's do Thursday, February 2, at
9 2:30 p.m. Eastern time for a hearing on Defendants' motion for
10 a preliminary injunction as well as for the Defendants to be
11 heard on whether the TRO should remain in effect.

12 And if you're able to confer with them after serving
13 them with both the TRO itself and the transcript of today's
14 proceeding regarding whether the parties believe they should
15 keep that date, which I'm inclined to keep even just to have a
16 discussion about how to proceed and whether there's any
17 agreement as to interim relief that the parties are amenable
18 to.

19 MR. BLUME: Your Honor, just to clarify, there is in
20 place a sealing order. The way it reads is we will serve --
21 the case will remain under seal until we serve at least one of
22 the Defendants.

23 THE COURT: Yes.

24 MR. BLUME: And then we will notify the Court they
25 have been served, and then the Court can --

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1 THE COURT: We'll unseal the record. All right.

2 In that case, I'll make the transcript of today's
3 proceeding available on the docket once the --

4 MR. BLUME: We're happy -- I think whatever works.
5 We're happy to serve it on them, that's easy. I just wanted
6 to make sure --

7 THE COURT: Why don't I ask you to work with the
8 court reporter to get an official transcript and review it for
9 typos and make sure it's accurate prior to service. And if
10 you need to serve the order first and the transcript
11 thereafter, you can do so in case it takes the reporter a bit
12 of time to get it together.

13 MR. BLUME: Thank you. I would suggest that only to
14 be fair to the Defendants to give them whatever opportunity,
15 to give them more time.

16 THE COURT: And also given the nature of the harm, I
17 don't want to delay service of the order.

18 What I would appreciate is if later today or this
19 evening you could modify your proposed order. I would ask you
20 to take out the broader requests in subparts two through five
21 of your proposed order enjoining them from violating the
22 statutes listed.

23 If you'd like and you think it's appropriate, you
24 can add for my consideration some additional factual findings
25 related to the matters we discussed today that go to why the

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1 Government has established probable cause for the violation of
2 those factors and the specific harms covered by the statute
3 that are resulting. I may modify that as well, but why don't
4 you take a crack at including those?

5 In addition, I am not positive that the statute I
6 originally thought might cover the issue of destruction of
7 evidence in fact does, but I'd ask you to check and confer
8 with your colleagues as to whether 18 U.S.C. Section 1519,
9 which seems to contain a broad prohibition under the criminal
10 statute of destroying or tampering with any records or
11 information that may be the subject of a federal
12 investigation.

13 It says specifically an investigation under
14 Chapter -- Title 11 and not knowing the nature of the
15 Government's potential investigation and not having a
16 photographic memory for all that is included in Chapter 11, I
17 don't know that that is the applicable one, but certainly
18 under the Rules of Civil Procedure, now that a TR0 is issued
19 and the Government has a duly-filed motion for preliminary
20 injunction, the Defendants are well advised under the Civil
21 Rules not to engage in such destruction or tampering. But
22 given the history outlined by the Government, to the extent
23 there are any criminal prohibitions on such actions that the
24 Government believes should be included, I'm happy to have you
25 include those for my consideration.

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1 MR. BLUME: And logistically, your Honor, we
 2 anticipate sending -- because this case is under seal, we
 3 anticipate sending a letter by e-mail. That's the normal
 4 course --

5 THE COURT: Yes, to the chambers e-mail a copy of
 6 the proposed order with a cover letter to my staff at the
 7 chambers e-mail, and then I will modify it and provide it to
 8 you also under seal or back by that method.

9 Anything further?

10 MR. BLUME: No, your Honor. Thank you.

11 THE COURT: Thank you very much. Have a good day.
 12 (Matter concluded.)

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I N D E X

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WITNESSPAGE

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DANIEL KONESCHUSKY

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DIRECT EXAMINATION BY MR. BLUME

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*I (we) certify that the foregoing is a correct transcript
 from the record of proceedings in the above-entitled matter.*

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/s/ Linda A. Marino
 LINDA A. MARINO

January 24, 2023
 Date